

United States
Circuit Court of Appeals
For the Ninth Circuit.

P. L. LAMPHERE, as Administrator of the Estate of
C. ROY LAMPHERE, Deceased, and as the
Personal Representative of Said Deceased,

Plaintiff in Error,

vs.

THE OREGON RAILROAD & NAVIGATION COM-
PANY (a Corporation), and THE OREGON-
WASHINGTON RAILROAD & NAVIGATION
COMPANY (a Corporation),

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States Circuit Court for
the Eastern District of Washington, Eastern Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the Circuit Court of the United States for the
Eastern District of Washington, Eastern Divi-
sion.*

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate
of C. ROY LAMPHERE, Deceased, and as
the Personal Representative of said Deceased,
Plaintiff,

vs.

THE OREGON RAILROAD & NAVIGATION
COMPANY (a Corporation), and the ORE-
GON-WASHINGTON RAILROAD & NAV-
IGATION COMPANY (a Corporation),
Defendants.

Names and Addresses of Attorneys.

W. H. PLUMMER and HENRY JACKSON
DARBY, 1201-1202 Old National Bank Build-
ing, Spokane, Washington,
Attorneys for Plaintiff.

W. W. COTTON, ARTHUR C. SPENCER,
RALPH E. MOODY, of Portland, Oregon, and
SAMUEL R. STERN, Columbia Building, Spo-
kane, Washington,

Attorneys for Defendants [1*]

*Page number appearing at foot of page of original certified Record.

*In the Circuit Court of the United States for the
Eastern District of Washington, Eastern Divi-
sion.*

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate
of C. ROY LAMPHERE, Deceased, and as
the Personal Representative of said Deceased,
Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COM-
PANY (a Corporation), and the OREGON-
WASHINGTON RAILROAD & NAVIGA-
TION COMPANY (a Corporation),
Defendants.

Amended Complaint.

Comes now the above-named plaintiff and files and
serves this his emended complaint, and alleges:

I.

That on the 4th day of February, 1911, letters of
administration upon the estate of the said C. Roy
Lamphere, deceased, were duly issued by the Supe-
rior Court of the State of Washington, in and for
the County of Spokane, to the plaintiff, by which he
was appointed administrator of all of the goods, and
credits belonging to the said C. Roy Lamphere at
the time of his death, and that during all the times
since he has been and now is, the duly appointed,
qualified and acting administrator of the estate of
the said C. Roy Lamphere, deceased, and brings this
action against the above-named defendants as such

administrator as the personal representative of said deceased for the benefit of the surviving widow and minor child of the said C. Roy Lamphere, deceased, to wit, Viola Lamphere, and Paul Lamphere. [1½]

II.

That the Oregon Railroad & Navigation Company was at the time of the happening of the injury and death hereinafter pleaded, a railroad corporation, created, organized and existing under and by virtue of the laws of the State of Oregon, and engaged in, and doing business as a common carrier of freight and passengers by railroad between the States of Oregon, Washington and Idaho.

III.

That at the time of the happening of the injury and death to C. Roy Lamphere, and immediately prior thereto, he was engaged in the performance of his duty in the employment of said Oregon Railroad & Navigation Company, and doing and performing exclusively the acts and things necessary and proper to be done in the performance of his said duties in obedience to the orders of said company, and as a part of the necessities and requirements of said company, in aid of, and as a part of the operation of its cars, engines and trains in carrying on its business of interstate commerce by railroad.

IV.

That the Oregon-Washington Railroad & Navigation Company is a Corporation created, organized and existing under and by virtue of the laws of the State of Oregon, and subsequent to the happening of the injury and death to said C. Roy Lamphere herein

mentioned, took over all of the property and interests of the said Oregon Railroad & Navigation Company, and assumed all of its rights, interests and obligations.

V.

That on, to wit, December 1st, 1910, and for a long time prior thereto, said Oregon Railroad & Navigation Company, hereinafter designated in this complaint as "The Company," maintained, owned and operated its line of railroad through [2] and within the city of Tekoa, Washington, and had provided, maintained and operated therein, in addition to its main line of track, certain sidetracks, depot grounds, yards, switches and other appliances.

VI.

That on, to wit, the 1st day of December, 1910, said company provided and maintained across its numerous tracks near the north end of its passenger station, a certain footpath, extending from a foot-bridge situated on the west side of said yard, across said tracks past the north end of its passenger station connecting with one of the principal thoroughfares in the said city on the east side of said yard, which footpath was on said day, and had been for a number of years prior thereto, used continuously by some of the employees of said company, including said C. Roy Lamphere, in the performance of their duties, and other pedestrians, commonly, generally and notoriously, in walking from a west side portion of said town to said passenger station and other parts of said company's yard and to other parts of said town.

VII.

That at the time of the happening of the injury and death to said C. Roy Lamphere, hereinafter referred to, and for a long time prior thereto, he was in the employ of said company as a locomotive fireman, and resided in said city of Tekoa in the western portion of said town and westerly from the yard and passenger station of said company, and his duties as such fireman required him to respond at any time of the day or night when he should be called upon by said company to perform any of his duties assigned him from time to time.

VIII.

That said footpath crossing said tracks and yard, as aforesaid, was so commonly and frequently used, as aforesaid, [3] that said company and its employees operating, using and switching cars and making up trains in said yard, would so arrange said trains and cars, that an opening would always be left between the ends of the cars so as to provide a passageway between said cars, upon said footpath, so as to enable said footpath to be used as aforesaid, and it was also the custom and practice of said company that before any of said cars on either side of said footpath would be coupled together or jammed together for any purpose, a brakeman, switchman or other employee would be placed upon said footpath crossing so as to warn pedestrians and other employees of said company and prevent injuries by the coming of said cars.

IX.

That on said first day of December, 1910, at about

7:15 P. M. of said day, in said town of Teoka, Washington, said defendant ordered said Lamphere to proceed from his home to said passenger station and there secure proper transportation and go aboard Train No. 3, which train was due at 7:45 P. M. of said day, and was an interstate train and proceed upon said train to Spokane, Washington, and relieve the fireman on Engine No. 522, which engine was pulling a train of cars engaged at the time in interstate commerce by railroad.

X.

That immediately after receiving said order mentioned in the proceeding paragraph herein, said Lamphere immediately left his home and proceeded toward said railway station, for the purpose of obeying said orders and getting upon said train to relieve the said fireman as aforesaid, and for that purpose he proceeded along and upon said footpath upon and across the yard of said company, in the performance of his said duties, and for the purpose of, and as one of the necessary acts in performing his duty as a fireman for said company in its [4] service in carrying on its business of an interstate common carrier by railroad.

XI.

That while passing upon and along said footpath as aforesaid he attempted to pass through between two cars that had been left on either side of said footpath, and in the space intervening between said two cars provided for that purpose, and while so attempting to pass through between said cars on said footpath, using all reasonable care and caution in so

doing, said company, through its agents, servants and employees, handling the cars of the company engaged in interstate commerce, and without giving any warning to said Lamphere of its intention so to do, carelessly, negligently and recklessly, suddenly and violently forced said two cars together, catching the person of said Lamphere between the bumpers or knuckles on the end of said cars, crushing, maiming and wounding him so badly and to such an extent that he died within a very short time thereafter, and during the same day.

XII.

That the proximate and immediate cause of the death of said Lamphere was due wholly and exclusively to the negligence, carelessness and recklessness on the part of said company, its agents and servants in not using reasonable care and caution to prevent the injury to said Lamphere in backing, shoving and forcing said cars together upon said footpath, and failing to give said Lamphere any warning or notice of its intention so to do, and in not maintaining any lookout or flagman or other employee at said point on said footpath, so as to warn said Lamphere of its intentions and acts in the premises.

XIII.

That by reason of the death of said C. Roy Lamphere, and of the negligence, carelessness and recklessness on the [5] part of said company, said Viola Lamphere, as his widow, and Paul Lamphere, as his minor child, and this plaintiff as administrator of the estate of C. Roy Lamphere, and as his personal repre-

sentative, have been damaged in the sum of Fifty Thousand (\$50,000.00) Dollars, no part of which has been paid.

WHEREFORE, plaintiff demands judgment against the above-named defendants, and each of them, for the sum of Fifty Thousand (\$50,000.00) Dollars, and for his costs and disbursements herein.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff.

State of Washington,
County of Spokane,—ss.

W. H. Plummer, being first duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled cause, and makes this verification on behalf of plaintiff for the reason that said plaintiff is at present not within the State of Washington; that he has read the foregoing amended complaint, knows the contents thereof, and that the same is true as he verily believes.

(Signed) W. H. PLUMMER.

Subscribed and sworn to before me this 21st day of July, 1911.

(Signed) FRED J. CUNNINGHAM,
Notary Public Residing at Spokane, Washington.

[Endorsements]: Service admitted this 21st day of July, 1911.

(Signed) SAMUEL R. STERN,
Attorney for Defendants.

Amended Complaint. Filed in the U. S. Circuit Court for the Eastern District of Washington, July 21, 1911. Frank C. Nash, Clerk. [6]

*In the Superior Court of the State of Washington,
in and for the County of Spokane.*

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate
of C. ROY LAMPHERE, Deceased, and as
the Personal Representative of Said Deceased,
Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COM-
PANY (a Corporation), and the OREGON-
WASHINGTON RAILROAD & NAVIGA-
TION COMPANY (a Corporation),
Defendants.

Demurrer [of Oregon R. R. & Nav. Co.].

Comes now the Oregon Railroad & Navigation
Company, one of the defendants in the above-entitled
action, and demurs to the complaint of the plaintiff
on file herein upon the ground:

That the complaint of the plaintiff fails to state
facts sufficient to constitute a cause of action against
this defendant.

W. W. COTTON,
ARTHUR C. SPENCER,
SAMUEL R. STERN,
RALPH E. MOODY,

Attorneys for the Defendant Oregon Railroad &
Navigation Company.

Due service of the within demurrer, by a true copy
thereof, is hereby admitted at Spokane, Washington,

this — day of March, A. D. 1911.

W. H. PLUMMER,
Attorney for Plaintiff.

Filed March 22, 1911, at 1:20 o'clock P. M. Glenn B. Derbyshire, Clerk. By Otto W. Blenner.

[Endorsements]: Filed as part of the Defendant's Transcript of Record on Removal from State Court to Federal Court, in the U. S. Circuit Court for the Eastern Dist. Wash. Apr. 17, 1911. F. C. Nash, Clerk. [7]

*In the Superior Court of the State of Washington,
in and for the County of Spokane.*

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate
of C. ROY LAMPHERE, Deceased, and as
the Personal Representative of Said Deceased,
Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COM-
PANY (a Corporation), and the OREGON-
WASHINGTON RAILROAD & NAVIGA-
TION COMPANY (a Corporation),
Defendants.

**Demurrer [of Oregon-Washington R. R. &
Nav. Co.].**

Comes now the Oregon-Washington Railroad & Navigation Company, one of the defendants in the above-entitled action, and demurs to the complaint of the plaintiff on file herein upon the ground:

That the complaint of the plaintiff fails to state facts sufficient to constitute a cause of action against this defendant.

W. W. COTTON,
ARTHUR C. SPENCER,
SAMUEL R. STERN,
RALPH E. MOODY,

Attorneys for Defendant Oregon-Washington Railroad & Navigation Company.

Due service of the within demurrer, by a true copy thereof, is hereby admitted at Spokane, Washington, this — day of March, A. D. 1911.

W. H. PLUMMER,
Attorney for Plaintiff.

Filed March 22, 1911, at 1:20 o'clock P. M. Glenn B. Derbyshire, Clerk. By Otto B. Blenner, Deputy.

[Endorsements]: Filed as part of the Defendant's Transcript of Record on Removal from State Court to Federal Court, in the U. S. Circuit Court for the East. Dist. of Wash. Apr. 17, 1911. Frank C. Nash, Clerk. [8]

*In the Circuit Court of the United States for the
Eastern District of Washington, Eastern
Division.*

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate
of C. ROY LAMPHERE, Deceased, and as
the Personal Representative of Said Deceased,
Plaintiff,

vs.

THE OREGON RAILROAD & NAVIGATION
COMPANY (a Corporation), and the
OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY (a Corporation),
Defendants.

Opinion.

W. H. PLUMMER, for Plaintiff.

W. W. COTTON, RALPH E. MOODY and
SAMUEL R. STERN, for Defendants.

RUDKIN, District Judge.—On the first day of December, 1910, C. Roy Lamphere, a resident of Tekoa, Washington, was in the employ of the Oregon Railroad & Navigation Company as a locomotive fireman. On the evening of that day he received orders from his superior officers to board a west-bound train at Tekoa, as a part of a dead-head crew, and to proceed thence westerly to a certain town, there to relieve an engine crew which had been constantly employed for more than sixteen hours on an engine hauling an interstate train. On the way from his home to the depot at Tekoa for the purpose of taking the

train as directed, Lamphere was crushed between two cars and received injuries from which he thereafter died. The present action is prosecuted by his personal representative under the Employers' Liability Act of 1908 (36 Stat. 65) to recover damages for his death, and the sufficiency of the complaint to bring the [9] case, within the provisions of that act is challenged by demurrer.

Section one of the act declares, "that every common carrier by railroad while engaged in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee to his or her personal representative," etc. Subsequent sections abrogate or materially modify the defenses which have heretofore been available to defendants in this class of actions.

It was conceded on the argument, by counsel for both parties, that the deceased was killed through the negligence of his fellow-servants, and that the complaint states no ground of recovery at common law. In view of this concession it is perhaps unnecessary to consider that phase of the case, but in any event the allegations of the complaint clearly show that the deceased and the servants whose negligence caused his death were fellow-servants of a common master at the time of the injury, within the rule which has long prevailed in the federal courts.

Dayton Coal & Iron Co. vs. Dodd, 188 Fed. 597,
and cases cited.

If a right of recovery exists in this case, there-

fore, it must exist by virtue of the above act of Congress. It will be seen at a glance that in order to bring a case within the provisions of that act two things must concur. First. At the time of inflicting the injury the railroad company must have been engaged in interstate commerce, and, second, at the time of receiving the injury the injured employee must have been employed by the railroad company in interstate commerce. Such is the language of the act itself and such is the construction it must receive at the hands of the Courts in order to keep it within the pale of the Federal Constitution; for, whatever [10] differences of opinion may have existed among the several Judges of the Supreme Court, in the Employers' Liability Cases, 207 U. S. 463, they were all agreed that the power of Congress to regulate the relation of employer and employee, or of employees between themselves, under the commerce clause of the Federal Constitution, is limited to employers engaged in interstate commerce and to their employees employed in such commerce. Thus, in the majority opinion the present Chief Justice said:

“The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce.

Again, addressing himself to the argument that the language of the act should be restricted to rail-

roads actually engaged in interstate commerce, and to employees actually employed in such commerce, the same learned Judge said:

“So far as the face of the statute is concerned, the argument is this, that because the statute says carriers engaged in commerce between the States, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other, of such carriers, and that the words ‘any employee’ as found in the statute should be held to mean any employee when such employee engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it.”

In his dissenting opinion Mr. Justice Moody said:

“At the threshold I may say that I agree that the Congress has not the power directly to regulate the purely internal commerce of the States, and that I understand that to be the opinion of every member of the court.”

In his dissenting opinion, Mr. Justice Harlan said:

“Mr. Justice McKenna and myself are of opinion that it was within the power of Congress to prescribe, as between an interstate commerce carrier and its employees, the rule of liability established by the act of June 11, 1906. But we do not concur in the interpretation of that act as given in the opinion delivered by Mr. Justice White, but think that the act, reasonably and properly interpreted, applies, and should be interpreted as intended by Congress to apply, only to cases of interstate commerce and to

employees who, at the time of the particular wrong or injury complained of, are engaged in such commerce, and not to domestic commerce or commerce completely internal to the State in which the wrong or injury occurred.” [11]

In *Adair vs. United States*, 208 U. S. 161, 177, the Court said:

“So, in reference to *Employers’ Liability Cases*, 207 U. S. 463, decided at the present term. In that case the Court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employees in such interstate commerce, in cases of personal injuries received by employees while actually engaged in such commerce. The decision on this point was placed on the ground that a rule of that character would have direct reference to the conduct of interstate commerce, and would, therefore, be within the competency of Congress to establish for commerce among the States, but not as to commerce completely internal to a State. Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated.”

In *St. Louis, I. M. & S. Ry. Co. vs. Conley*, 187 Fed. 949, Judge Riner, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

“In considering the act of 1906, * * * in the *Employers’ Liability Cases*, * * * the Supreme

Court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability as between interstate carriers and their employees in such interstate commerce in cases of personal injuries received by employees while actually engaged in such commerce, basing its conclusions, as we understand the case, on the ground that a rule of that character would have direct reference to the conduct of interstate commerce, and would therefore be within the power of Congress to establish. But as the act included not only this class of employees, but all employees, many of whom were not actually engaged in the movement of interstate commerce, it was held that Congress had exceeded the power conferred upon it by the commerce clause of the Constitution. The act of 1908 provides that every common carrier by railroad, while engaged in interstate commerce, shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce, or in case of the death of such employee 'resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, *warfs*, or other equipment.' This statute is in derogation of the common law, and it must be conceded that such statutes must be construed strictly; but, as suggested by Chief Justice Parker in *Gibson vs. Jenney*, 15 Mass. 205, 'they are also to be construed sensibly and with a view to the object aimed at by the legis-

lature.' The primary object of the act was to promote the safety of employees of railroads while actively engaged in the movement of interstate commerce, and is well calculated to subserve the interests of such commerce, by affording such [12] protection; there being, as it seems to us, a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object."

While the statute is in derogation of the common law and must be strictly construed, it is nevertheless apparent that Congress intended to exert its authority over the subject matter embraced in the act to the fullest extent, and it is the duty of the Courts to bring within its protection every employee of interstate railroads who can justly be said to be employed in interstate commerce at the time of receiving an injury. But giving to the statute this broad and liberal interpretation, it is still manifest that a vast majority of the army of men employed by the interstate railroads of the country in their different departments are so remotely and indirectly connected with the movement of interstate commerce that it is without the power of the Federal Government to regulate their relations to their employers or to each other. Men engaged in the manufacture of ties or steel rails which may ultimately be used in the construction of interstate railroads are not employed in interstate commerce; men employed in the building of cars or in the construction of railroads fall within the same category. It would also seem that men employed in the repair of en-

gines or cars which have been removed from the service, or in the general maintenance or repair of railroads used indiscriminately in intrastate and interstate commerce are not employed in interstate commerce, although there is a diversity of opinion on this question.

Peterson vs. Delaware, L. & W. R. Co., 184 Fed. 737, and cases there cited.

To hold that persons so generally employed are employed in interstate commerce would seem to be an unwarranted invasion of the police power of the State under the guise of commercial regulations. There is no real or substantial relation between such employments and the commerce regulated. [13] Adair vs. United States, *supra*. As said in the Conly case, *supra*, the primary object of the act was to promote the safety of employees of railroads while actively engaged in the movement of interstate commerce, and it may well be doubted whether the provisions of the act can be extended so as to include employees not so engaged. It would be unwise and impracticable to attempt in advance to draw an arbitrary line between those who are employed in interstate commerce and those who are not, as each case depends in a large measure upon its own circumstances and such questions must be met and solved as they arise. For the purposes of this case I deem it sufficient to say that a locomotive fireman is not, while on the way from his home to the depot, for the purpose of taking a train to a distant point, as a part of a dead-head crew, there to fire an engine hauling an interstate train, employed

in interstate commerce. Indeed, he is not employed in commerce of any kind. His employment is only constructive at best and such employment does not satisfy the requirements of this act.

The demurrer is therefore sustained, and the case will be stricken from the trial calendar where it was placed subject to the ruling on the demurrer.

[Endorsements]: Opinion. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 13th, 1911. Frank C. Nash, Clerk. [14]

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,
Plaintiff,

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Order [Sustaining Demurrers, etc.].

This cause coming on to be heard on defendant's demurrer to plaintiff's amended complaint, and after argument by counsel and the matter having been taken under advisement by the Court, and the Court

having heretofore rendered its opinion thereon, which opinion has been filed with the clerk of this court, and the Court being fully advised in the premises,

It is hereby ORDERED that said demurrers of defendants to plaintiff's amended complaint be, and the same are hereby, sustained, to all of which plaintiff excepts and exceptions are allowed.

It is further ORDERED that the setting of this case be, and the same is hereby, vacated.

Done in open court this 16th day of October, 1911.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Sustaining Demurrers to Plaintiff's Amended Complaint. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 16, 1911. Frank C. Nash, Clerk. [15]

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,
Plaintiff,

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Judgment and Order.

This cause coming on to be heard this 16th day of October, 1911, the above-named plaintiff appearing by W. H. Plummer and Henry Jackson Darby, his attorneys, and the defendant appearing by W. W. Cotton, Ralph E. Moody and Samuel R. Stern, and it appearing to the Court from the records and files in this cause that the demurrers heretofore interposed to plaintiff's amended complaint by the defendants, upon the ground that said amended complaint does not state facts sufficient to constitute a cause of action against defendants, were heretofore sustained by this Court, to all of which plaintiff excepted and exceptions allowed, and thereafter on this date the plaintiff refused to plead further herein, and upon said refusal to plead further in this cause,

It is hereby ORDERED and ADJUDGED: That plaintiff take nothing by this action, this action be, and the same is hereby, dismissed, and that defendant shall recover their [16] costs and disbursements herein.

To all of which plaintiff excepts and exceptions are allowed.

Done in open court this 17th day of October, 1911.

(Signed) FRANK H. RUDKIN,

Judge.

O. K. as to form.

(Signed) PLUMMER,

Atty. for Plaintiff.

[Endorsements]: Service admitted this 14th day of October, 1911.

(Signed) S. R. STERN,
Attorney for Defendants.

Judgment and Order. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 17, 1911. Frank C. Nash, Clerk. [17]

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,
Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Assignment of Errors.

Comes now P. L. Lamphere, as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, the plaintiff in the above-entitled action, and makes and files the following assignments of error in said cause, which said plaintiff and plaintiff in error will rely upon in the United States Circuit Court of Appeals

for the Ninth Judicial Circuit for relief from and a reversal of *of* the judgment entered in said cause in the court below, to wit:

I.

That the said Court erred in *in* sustaining the demurrers interposed by defendants and defendants in error to the amended complaint filed in said cause, and by holding and deciding that the facts stated in said amended complaint filed were not sufficient to constitute a cause of action against said defendants and defendants in error. [18]

II.

That the Court erred in dismissing the action of plaintiff and in rendering judgment for defendants.

WHEREFORE, the said plaintiff in error prays that the judgment of the Circuit Court of the United States for the Eastern District of Washington, Eastern Division, be reversed and that the said Circuit Court be directed to overrule the demurrers of said defendants and defendants in error.

(Signed) W. H. PLUMMER,

(Signed) H. J. DARBY,

Attorneys for Plaintiff in Error, Plaintiff in the Lower Court.

Service admitted this 18th day of October, 1911.

(Signed) SAMUEL R. STERN,

Attorney for Defendants.

[Endorsements]: Assignment of Errors. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 18, 1911. Frank C. Nash, Clerk. [19]

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,
Plaintiff,

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above-named plaintiff, by his attorneys, and complains that in the record and proceedings had in said cause and also in the rendition of the judgment in the above-entitled cause in said United States Circuit Court for the Eastern District of Washington, Eastern Division, at the April term thereof, 1911, manifest error hath happened to the great damage of this plaintiff.

Your petitioner further respectfully shows that he has this day filed herewith his Assignment of Errors committed by the court below in said cause and intended to be urged by your petitioner and plain-

tiff in error in the prosecution of this, his suit in error. [20]

WHEREFORE, said plaintiff prays for the allowance of a Writ of Error to the said Circuit Court and for an order fixing the amount of bond, and for such other orders and process as may cause the same to be corrected by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 17th day of October, 1911.

(Signed) W. H. PLUMMER and
H. J. DARBY,

Attorneys for Plaintiff.

Service admitted this 18th day of October, 1911.
Further notice of application waived.

(Signed) SAMUEL R. STERN (M. C.),
Attorney for Defendants.

[Endorsements]: Petition for Writ of Error. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 18, 1911. Frank C. Nash, Clerk. [21]

In the Circuit Court of the United States, for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,

Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Defendants.

Order Allowing Writ of Error, etc.

P. L. Lamphere, as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, having this day filed his petition for a writ of error from the decision and judgment made and rendered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an assignment of error within due time, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error.

Now, therefore, it is ORDERED, that a Writ of Error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the

Ninth Judicial Circuit, the judgment heretofore entered herein, and that the amount of bond on said Writ of Error be, and hereby is, fixed at Five Hundred (\$500.00) Dollars.

Dated this 18th day of October, 1911.

(Signed) FRANK H. RUDKIN,

Judge. [22]

[Endorsements]: Order Allowing Writ of Error. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 18, 1911. Frank C. Nash, Clerk. [23]

In the Circuit Court of the United States, for the Eastern District of Washington, Eastern Division.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,

Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Defendants.

Writ of Error [Original].

United States of America,—ss.

The President of the United States, to the Honorable, the Judge of the Circuit Court of the

United States, for the Eastern District of Washington, Eastern Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between P. L. Lamphere as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, plaintiff in error, and Oregon Railroad & Navigation Company, a corporation, and the Oregon-Washington Railroad & Navigation Company, a corporation, defendants in error, a manifest error hath happened, to the great damage of the said P. L. Lamphere, as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, plaintiff [24] in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 17th day of November next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and

according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 18th day of October, in the year of our Lord one thousand nine hundred and eleven.

[Seal] FRANK C. NASH,
Clerk of the United States Circuit Court for the
Ninth Circuit, Eastern District of Washington,
Eastern Division.

Allowed by:

FRANK H. RUDKIN,
District Judge. [25]

[Endorsed]: In the Circuit Court of the United States for and Within the Eastern District of Washington, Eastern Division. P. L. Lamphere, Admr., Plaintiff, vs. Oregon Railroad & Navigation Co., a Corporation, et al., Defendants. Writ of Error. Filed in the U. S. Circuit Court, Eastern Dist. of Washington. Oct. 18, 1911. Frank C. Nash, Clerk. _____, Dep.

In the Circuit Court of the United States, for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,

Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, P. L. Lamphere, as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, as principal, and Massachusetts Bonding and Insurance Company, a corporation established under the laws of the Commonwealth of Massachusetts and having its principal office in Boston in said Commonwealth, as surety, are held and firmly bound unto the Oregon Railroad & Navigation Company, a corporation, and the Oregon-Washington Railroad & Navigation Company, a corporation, and each of them, in the full and just sum of Five Hundred (\$500.00) Dollars, to be paid to them, their successors or assigns,

for the payment of which well and truly to be made we bind ourselves and each of us and our, and each of our assigns, successors and administrators jointly and severally firmly by these presents.

Sealed with our hands and dates this 18th day of October, 1911. [26]

WHEREAS, lately, in the Circuit Court of the United States, in and for the Eastern District of Washington, Eastern Division, in an action pending in said court between P. L. Lamphere as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, as plaintiff, and the Oregon Railroad & Navigation Company, a corporation, and the Oregon-Washington Railroad & Navigation Company, a corporation, as defendants, a judgment of dismissal was rendered in favor of said defendants and against plaintiff, and costs of action, and the said plaintiff has obtained from said court a Writ of Error to reverse said judgment in the aforesaid action and a citation directed to the said above-named defendants, citing and admonishing them to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THEREFORE, the condition of this obligation is such that if the said P. L. Lamphere, as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, shall prosecute his said Writ of Error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall

the void, otherwise the same shall remain in full force and effect.

(Signed) P. L. LAMPHERE.

Administrator of the Estate of C. Roy Lamphere.

(Signed) MASSACHUSETTS BONDING
AND INSURANCE COM-
PANY.

By ROBERT W. GRINELL,

Attorney in Fact.

Attest: HENRY J. WARD,

Attorney in Fact.

[Seal of Corporation Surety Company.]

The above and foregoing bond approved this 18th day of October, 1911.

(Signed) FRANK H. RUDKIN,

Judge. [27]

[Endorsements]: Bond on Writ of Error. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 18th, 1911. Frank C. Nash, Clerk. [28]

In the Circuit Court of the United States, for the Eastern District of Washington, Eastern Division.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,

Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COM-
PANY (a Corporation), and the OREGON-

WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Citation [Original].

United States of America,—ss.

The President of the United States to the Oregon Railroad & Navigation Company, a Corporation, and the Oregon-Washington Railroad & Navigation Company, a Corporation, and to W. W. Cotton, Arthur G. Spencer, Samuel R. Stern, and Ralph E. Moody, Your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Eastern District of Washington, Eastern Division, wherein P. L. Lamphere, as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, is plaintiff in [29] error, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 18th day of October, 1911, and of the

Independence of the United States the one hundred and thirty-fifth.

FRANK H. RUDKIN,

United States District Judge, Presiding in the Circuit Court.

[Seal] Attest: FRANK C. NASH,
Clerk. [30]

Service admitted this 18th day of October, 1911.

SAML. R. STERN,
Attorney for Defendants.

[Endorsed]: In the Circuit Court of the United States for and Within the Eastern District of Washington, Eastern Division. P. L. Lamphere, Admr., Plaintiff, vs. Oregon Railroad & Navigation Co., a Corporation et al., Defendants. Citation. Filed in the U. S. Circuit Court, Eastern Dist. of Washington. Oct. 18, 1911. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. Roy LAMPHERE, Deceased, and as the Personal Representative of said Deceased,
Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Praeceptum for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of record to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, of the following: Amended Complaint, Demurrers to Amended Complaint, Opinion Sustaining Demurrers to Amended Complaint, Order Sustaining Demurrers to Amended Complaint, Judgment of Dismissal, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error, Writ of Error, Bond on Writ of Error and Citation.

Dated this 18th day of October, 1911.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff.

[Endorsements]: Praeceptum for Transcript of Record. Filed in the U. S. Circuit for the Eastern District of Washington, October 18, 1911. Frank C. Nash, Clerk. [31]

[Certificate of Clerk U. S. Circuit Court to
Record, etc.]

*In the Circuit Court of the United States for the
Eastern District of Washington, Eastern
Division.*

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate
of C. ROY LAMPHERE, Deceased, and as the
Personal Representative of said Deceased,
Plaintiff,

vs.

THE OREGON RAILROAD & NAVIGATION
COMPANY (a Corporation), and the
OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY (a Corporation),
Defendants.

United States of America,
Eastern District of Washington,
State of Washington,—ss.

I, Frank C. Nash, Clerk of the Circuit Court of
the United States for the Eastern District of Wash-
ington, do hereby certify that the foregoing type-
written pages, numbered from one to thirty-one,
inclusive, constitute and are true and correct copies
of the Amended Complaint, Demurrers of Defend-
ants to said Amended Complaint, Opinion of the
Court Sustaining said Demurrers, Order Sustaining
Demurrers, Judgment of Dismissal, Assignment of
Errors, Petition for Writ of Error, Order Allowing
Writ of Error and Bond on Writ of Error, as the
same remain on file and of record in said Circuit

Court, and that the same, which I transmit, constitutes my return to the annexed Writ of Error, lodged and filed in my office on the 18th day of October, 1911.

I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and [32] certifying said record amounts to the sum of \$15.70, and that the same has been paid in full by the attorneys for the plaintiff in said action.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at the City of Spokane, in said Eastern District of Washington, in the Ninth Judicial Circuit, this 24th day of October, A. D. 1911, and the Independence of the United States of America the One Hundred and Thirty-sixth.

[Seal]

FRANK C. NASH,

Clerk, U. S. Circuit Court for the Eastern District
of Washington. [33]

[Endorsed]: No. 2066. United States Circuit Court of Appeals for the Ninth Circuit. P. L. Lamphere, as Administrator of the Estate of C. Roy Lamphere, Deceased, and as the Personal Representative of Said Deceased, Plaintiff in Error, vs. The Oregon Railroad & Navigation Company (a Corporation), and the Oregon-Washington Railroad & Navigation Company (a Corporation), Defendants in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Eastern District of Washington, Eastern Division.

Filed November 9, 1911.

FRANK D. MONCKTON,

Clerk.

By Meredith Sawyer,

Deputy Clerk.

